IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	CRIMINAL ACTION
v.	:	
	:	NO. 05–440–18
ASYA RICHARDSON	:	

SURRICK, J. **AUGUST 30 , 2010**

MEMORANDUM

Presently before the Court are Defendant Asya Richardson's Motions for Judgments of Acquittal Pursuant to Federal Rule of Criminal Procedure, Rule 29(c), or, in the Alternative, for a New Trial Pursuant to Federal Rule of Criminal Procedure, Rule 33. (Doc. No. 953.) For the following reasons, the Motions will be denied.

I. BACKGROUND

Asya Richardson is one of a number of defendants who were charged with and convicted of crimes committed in connection with a large-scale drug conspiracy operated by Alton Coles. Along with his coconspirators, Coles supplied the streets of Philadelphia with cocaine from 1998 to 2005. Richardson met Coles in the summer of 2002, and shortly afterward the two started dating. In December of 2002, Coles proposed to Richardson, notwithstanding the fact that he was seeing several other women, one of whom was pregnant with his fifth child. Within a year of the proposal, Richardson was in family court requesting a protection from abuse ("PFA") order against Coles after he assaulted her. Through those proceedings, it became clear that Richardson knew that Coles was, in her words, a "big time drug hustler."

Money was an important factor in the relationship between Richardson and Coles. Disputes over Richardson's spending were sometimes nasty. After law enforcement began monitoring Coles's phone calls via a legally obtained wiretap, several of these disputes were recorded. (*See, e.g.*, Gov't Exs. 267–6810 at 1; 267–6819 at 2; 275–6805 at 4–5.) One example involves Coles engaging in a diatribe against Richardson:

> What the fuck do you fuck with money that ain't the fuck yours for? It ain't your money! I don't wanna hear what I don't fucking give you; it's not your fucking money. . . . Why the fuck do you touch money that ain't yours without asking? That shit fucking pisses me off; you like a fucking kid, man. You're a asshole; you just touch shit that ain't yours. It ain't your fucking money . . . . What the fuck did you spend a thousand dollars on?

(Gov't Ex. 267–6810 at 1 (punctuation and grammar unaltered).) Despite the disputes, Richardson stayed with Coles. She was living with Coles when law enforcement officials arrested him in August 2005. At that time, they were living in an expensive custom-built home in Mullica Hill, New Jersey, with a Bentley automobile parked in the garage.

Richardson was not arrested at the same time as Coles. The Government eventually charged her for laundering Coles's drug proceeds and for committing wire fraud. Ultimately, Richardson was indicted along with Coles and the other members of his drug conspiracy. Count 1 of the 194-count Fifth Superseding Indictment (the "Indictment") charged Coles and eighteen other individuals with conspiracy to distribute at least 1200 kilograms of cocaine and 600 kilograms of cocaine base ("crack") in violation of 21 U.S.C. § 846. Richardson was charged in four counts with laundering money to conceal the nature, source, ownership, and control of illicit proceeds in violation of 18 U.S.C. § 1956(a)(1)(B)(i) and 18 U.S.C. § 2 (Count 79); conspiracy to launder money in violation of 18 U.S.C. § 1956(h) (Count 80); and wire fraud in violation of

18 U.S.C. § 1343 and 18 U.S.C. § 2 (Counts 87–88).

The money laundering counts arose out of Coles and Richardson's purchase of the custom-built home where Coles and Richardson lived at the time of Coles's arrest in August 2005. Located at 117 Dillons Lane in Mullica Hill, the home cost approximately $466,690. In early 2005, Coles put down two deposits totaling $40,000 with the homebuilder. (*See generally* Trial Tr. 13–25, Feb. 7, 2008, Vol. I; *see also* Gov't Ex. 250D.) In July 2005, Coles and Richardson attended the settlement of the property, where they paid an additional $74,000 to a title company. They made the payment with three checks from three separate bank accounts: one Citizens Bank account in Coles's name, one joint PNC Bank account in Coles's and Richardson's names, and one Wachovia account in the name of Naseem Coles, Coles's minor son. (*See* Gov't Ex. 250D.) Title to the house was in Richardson's name, and Richardson took out a stated-income loan to secure a $373,352 mortgage. The stated-income loan grossly overstated Richardson's income (*see* Trial Tr. 22, 41, 70–71, 82–83, 96–100, Feb. 5, 2008, Vol. II) and did not indicate that Coles would be making the monthly mortgage payments.

At trial, the Government presented evidence regarding the mortgage transaction that established that Coles and Richardson initially sought to purchase the home in both of their names and that the homebuilder was aware that Coles provided the money for the down payment. (*See id.* at 110–14, 120–23.) The couple applied to the homebuilder's loan origination company, NVR, for a type of no-document loan known as a "no income–no asset" loan, which Coles's 20% down payment made possible. (*Id.* at 125–26.) In the application, Coles stated that he earned $100,000 a year as the CEO of Take Down Records and Richardson stated that she earned $22,800 as an employee of Bank of America. (Gov't Ex. 710(A).) However, because Coles had

a poor credit score, the couple could not secure a mortgage from NVR and the loan had to be brokered to a loan origination company "of last resort" called Pike Creek Mortgage Services. (Trial Tr. 54, 61, 126–28, 133, 136, Feb. 5, 2008, Vol. II.) In order to obtain a mortgage through Pike Creek, Coles and Richardson had to change several aspects of the purchase. Coles was removed from the loan application and the sales contract (*see, e.g.*, Gov't Ex. 267–16745 at 7–8), and Richardson applied for a stated-income loan instead of the no income–no asset loan (Trial Tr. 14–16, Feb. 5, 2008, Vol. II). Richardson represented that her income was $114,000 in her application to Pike Creek. She obtained the loan, and purchased the property in her own name. (*Id.* at 70.)

The Government called IRS Special Agent Raymond Armstrong as a fact and expert witness to testify as to the various bank and cash transactions that led to the purchase of the property. (*See generally* Trial Tr. Feb. 7, 2008, Vol. I; Trial Tr. Feb. 8, 2008, Vol. I.) Agent Armstrong explained how Take Down Records, Coles's record company, was a business whose expenditures canceled out its revenues, meaning it had little or no net profit. (Trial Tr. 28–32, Feb. 8, 2008, Vol. I.) Agent Armstrong further explained how the major transaction dates in the purchase of the Dillons Lane property were preceded by an intricate series of transactions. First, Take Down Records received cash deposits of less than $10,000 into its bank account. Then, transfers or check deposits of roughly the same amount were placed into Coles's personal bank account. Coles would then write checks to the homebuilder or title agency. (*See* Trial Tr. 36–37, Feb. 7 2008, Vol. I; *see also* Gov't Ex. 250D.) In addition to the flow of money through the Take Down Records account into Coles's personal account, there were significant cash deposits into Coles and Richardson's joint account and to the account of Naseem Coles. (*See* Gov't Ex.

250D.) All of these activities were consistent with money laundering and with structuring, which is the practice of depositing cash in amounts of less than $10,000 in order to avoid currency transaction reporting requirements. (Trial Tr. 9–10, 57–58, Feb. 8, 2008, Vol. I.)

The transactions surrounding the settlement on the property were characteristic of all the transactions. Agent Armstrong's analysis demonstrated that on the day of the settlement over $34,000 in cash was deposited into accounts controlled by Coles (including Naseem Coles's Wachovia account), Richardson, and Take Down Records and that virtually all of that money went toward settlement costs. (*See* Gov't Ex. 250D.) With regard to these transactions, Agent Armstrong testified that Coles and Richardson's conduct indicated that they were "frankly running out of time" because there was "a need for a large amount of currency . . . to get into the financial system in a short period . . . ." (Trial Tr. 30, Feb. 7, 2008, Vol. I.) Agent Armstrong concluded that "[t]here's no reason in the world to not just take that money and stock it in one bank and buy your cashier's check. The only thing that would do would generate a currency transaction report, and that's the thing that, that this activity is attempting to avoid." (*Id.*) Richardson made at least one of the deposits, placing $9200 in cash into Coles and her joint PNC Account. (Trial Tr. 9, 57, 107–108 Feb. 8, 2008, Vol. I.) Another $9800 in cash was deposited into that account on the same day; however, Agent Armstrong could not determine whether the deposit was made by Richardson. (*Id.* at 107.)

On March 4, 2008, the jury returned a verdict finding Richardson guilty on the money laundering counts and not guilty on the wire fraud counts. (Doc. No. 748.)

II. RICHARDSON'S RULE 29 MOTION

A. LEGAL STANDARD

Federal Rule of Criminal Procedure 29(a) provides that "[a]fter the government closes its evidence or after the close of all evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." The court may reserve decision on the motion under Rule 29(b). "If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved." Fed. R. Crim. P. 26(b); *see also United States v. Brodie*, 403 F.3d 123, 133 (3d Cir. 2005) (stating that when a court reserves ruling on a Rule 29(a) motion it must "determine whether an acquittal was appropriate based solely on the evidence presented by the government").

"When sufficiency of the evidence at trial is challenged, the Court must affirm if a rational trier of fact could have found the defendant guilty beyond a reasonable doubt and if the verdict is supported by substantial evidence." *United States v. Bobb*, 471 F.3d 491, 494 (3d Cir. 2006) (citing *United States v. Coyle*, 63 F.3d 1239, 1243 (3d Cir. 1995)); *see also United States v. Smith*, 294 F.3d 473, 478 (3d Cir. 2002) (finding that courts should "sustain the verdict if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt"). Moreover, in considering such a motion, the court "must view the evidence in the light most favorable to the government . . . ." *Smith*, 294 F.3d at 478 (citing *United States v. Dent*, 149 F.3d 180, 188 (3d Cir. 1998); *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The court "must be ever vigilant in the context of Fed. R. Crim. P. 29 not to usurp the role of the jury by weighing credibility and assigning weight to the evidence, or by substituting its judgment for that

of the jury." *United States v. Brodie*, 403 F.3d 123, 133 (3d Cir. 2005). "A finding of insufficiency should be 'confined to cases where the prosecution's failure is clear.'" *Id.* (quoting *Smith*, 294 F.3d at 477).

B. Rule 29 Analysis

At the close of the Government's case, Richardson moved for a judgment of acquittal under Rule 29(a). We reserved ruling on Richardson's motion pursuant to the discretion afforded to the trial court by Rule 29(b). (*See* Hr'g Tr. 37, Feb. 11, 2008.) Following the verdict, Richardson retained a new attorney and renewed her motion for a judgment of acquittal under Rule 29(c). (Doc. No. 953.) Before addressing the substance of Richardson's motion, we must resolve a procedural issue regarding what evidence was in the record at the time that Richardson made her Rule 29(a) motion.

1. PFA Affidavit Identifying Coles as a Drug Dealer

In November 2003 Richardson obtained a state-court PFA order against Coles after he became physically violent with her. As part of her submission to the court, she filed an affidavit in which she refers to Alton Coles as a "big time drug hustler." (*See* Gov't Ex. 511Q–1.) Richardson now asserts that the Government did not introduce the affidavit into evidence during its case-in-chief, and that since the Government did not introduce it into evidence at that time, we cannot consider it in our review of her Rule 29 motion. (*See* Doc. No. 1109 at 4.)

The procedural posture at the close of the Government's case-in-chief was somewhat unusual. At that time, it was still unclear whether Richardson was going to testify. Thus, the statement in the affidavit identifying Coles as a "big time drug hustler" raised a potential *Bruton*

issue.[1] To resolve the issue and safeguard Richardson's right to choose to testify after the Government had rested, we bifurcated Counts 79 and 80 and held that the Government could only offer the statement that Coles was a big time drug dealer in the bifurcated portion of the trial. (Doc. No. 623.) As a result, when we gave our pre-charge to the jury and detailed the crimes charged by defendant, we mentioned only Richardson's wire fraud charges, and not the money laundering charges. (Trial Tr. 15, Jan. 16, 2008.)

After the Government rested, we discussed the bifurcation issue with counsel for all parties. (Trial Tr. 150–54, Feb. 11, 2008, Vol. III.) Richardson's trial attorney indicated that Richardson intended to testify. (*Id.* at 150.) In response, Coles's attorney stated that he did not have a *Bruton* issue if Richardson testified. (*Id.* at 151.) In the light of these developments, we asked the Government when it intended to introduce the affidavit and suggested that the orderly presentation would require that the Government present it in its case-in-chief. (*Id.* at 153.) The Government explained that it was concerned that if it offered the affidavit in its case-in-chief and Richardson then chose not to testify, the *Bruton* issue would reemerge. (*Id.* at 154.) Richardson's attorney agreed with the Government. (*Id.*) Recognizing that this was an unusual situation, we decided to deal with the matter as requested by the Government and Richardson's attorney. (*Id.* at 153–54.) Thereafter, Richardson moved for a judgment of acquittal on all counts, arguing that the Government had not presented sufficient evidence. (Trial Tr. 22–26, Feb. 11, 2008, Vol. II.) Before responding to the substance of Richardson's motion, the

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[1] *See generally Bruton v. United States*, 391 U.S. 123 (1968). "*Bruton* and its progeny established that in a joint criminal trial before a jury, a defendant's Sixth Amendment right of confrontation is violated by admitting a confession of a non-testifying codefendant that implicates the defendant, regardless of any limiting instruction given to the jury." *Johnson v. Tennis*, 549 F.3d 296, 298 (3d Cir. 2008).

Government noted that it had reserved the right to introduce Richardson's affidavit in the bifurcated portion of the trial. (*Id.* at 26.) We acknowledged the Government's concern about the affidavit and advised the Government to address Richardson's arguments. (*Id.*) We reserved ruling on the motion. (*Id.* at 36–37.)

We are satisfied now, as we were a trial, that there was a meeting of the minds among the Court and the parties that when the Government rested, with Counts 79 and 80 having been bifurcated, it had not closed its evidence against Richardson. Thus, Richardson cannot rely on Rule 29(b)'s requirement that we must "decide the motion on the basis of the evidence at the time the ruling was reserved" to exclude the affidavit from our review of her motion. *See* Fed. R. Crim. P. 29.

2. Money Laundering

The essential elements of the offense of money laundering in violation of 18 U.S.C. § 1956(a)(1) are

> (1) an actual or attempted financial transaction; (2) involving the proceeds of specified unlawful activity; (3) knowledge that the transaction involves the proceeds of some unlawful activity; and (4) . . . knowledge that the transactions were designed in whole or in part to conceal the nature, location, source, ownership, or control of the proceeds of specified unlawful activity.

United States v. Omoruyi, 260 F.3d 291, 294–95 (3d Cir. 2001). The two state of mind requirements in the statute are related but distinct: the defendant must have knowledge that the money came from an illegal activity and knowledge that the transaction at issue was designed, at least in part, to conceal that money. "Where . . . the defendant is not the source of the illegal funds, the inquiry into whether he knew of an intent to conceal occurs only after it has been established that he knew the funds were illegal." *United States v. Rahseparian*, 231 F.3d 1257,

1264 (10th Cir. 2000) (citing *United States v. Campbell*, 977 F.2d 854, 858 (4th Cir. 1992)). It is well-established that the money-laundering statute is not a money-spending statute. *United States v. Cefaratti*, 221 F.3d 502, 512 n.7 (3d Cir. 2000); *United States v. Olaniyi-Oke*, 199 F.3d 767, 771 (5th Cir. 1999); *United States v. Sanders*, 929 F.2d 1466, 1472 (10th Cir. 1991). "[S]omething more than mere transfer and spending is needed for money laundering, even if that 'something more' is hard to articulate." *United States v. Esterman*, 324 F.3d 565, 572 (7th Cir. 2003); *see also United States v. McGahee*, 257 F.3d 520, 527 (6th Cir. 2001) ("Every purchase or financial transaction conducted with illegal funds does not constitute money laundering."). Moreover, "[m]erely engaging in a transaction with money whose nature has been concealed through other means is not in itself a crime." *United States v. Garcia-Emanuel*, 14 F.3d 1469, 1474 (10th Cir. 1994). The money-laundering statute prohibits transactions involving the "proceeds of specified unlawful activit[ies]." *See* 18 U.S.C. § 1956(a)(1). Counts 1 and 2 of the Indictment charged Coles and others with conspiracy to distribute five kilograms or more of cocaine under 21 U.S.C. § 846 and with engaging in a continuing criminal enterprise under 21 U.S.C. § 848. (*See* Doc. No. 295 at 2–28.) Conspiracy to distribute cocaine and engaging in a continuing criminal enterprise are "specified unlawful activities" under the money-laundering statute. 18 U.S.C. § 1956(c)(7)(B)(i), (C).

Richardson challenges the sufficiency of the evidence with regard to the second, third, and fourth elements of her money laundering conviction. (*See* Doc. No. 953–2 at 3.)

(a) Definition of "Proceeds"

Richardson argues that the Government failed to prove that the purchase of the Dillon Lane property was made with "proceeds" from Coles's drug conspiracy because, under *United*

States v. Santos, 128 S. Ct. 2020 (2008), the term "proceeds" as used in § 1956(a)(1) means "profits," and the Government did not establish that Richardson and Coles used profits obtained from Coles's drug conspiracy to purchase the property. (Doc. No. 953–2 at 24.) The Government responds that *Santos* does not apply to Richardson's money laundering convictions because "proceeds" are defined as "gross receipts" where the underlying specified unlawful activity is drug distribution.[2] (Doc. No. 1067 at 16–17.)

In *Santos*, a jury convicted the defendant of promotion money laundering for using the proceeds of an illegal lottery to make payments to winners of the lottery and runners and collectors who facilitated the lottery's operation. 128 S. Ct. at 2023. On collateral review under 28 U.S.C. § 2255, the district court vacated the defendant's money-laundering convictions because there was no evidence that the transactions that formed the basis for the convictions involved profits, as opposed to receipts, of the illegal lottery. *Id.* The United States Court of Appeals for the Seventh Circuit affirmed. The Supreme Court granted *certiorari* and affirmed the Seventh Circuit in a 4–1–4 decision. The plurality opinion, written by Justice Scalia, concluded that the trial court had properly vacated the defendant's money laundering convictions because the term "proceeds," as used in § 1956(a)(1), was ambiguous and, therefore, the rule of lenity required the Court to construe the ambiguity in the defendant's favor. *Id.* at 2025. The plurality also identified what it described as a "merger problem": viewing "proceeds" as "receipts" would render "nearly every" violation of the illegal-lottery statute a violation of the

[2] In May 2009, Congress amended § 1956 to include a definition of the term "proceeds." Fraud Enforcement and Regulatory Act of 2009, Pub. L. No. 111-21, § 2(f)(1), 123 Stat. 1617, 1618 (2009). Section 1956(c)(9) now defines proceeds as "any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity." 18 U.S.C. § 1956(c)(9).

money-laundering statute, "because paying a winning bettor is a transaction involving receipts that the defendant intends to promote the carrying on of the lottery." *Id.* at 2026.

In a concurrence, Justice Stevens agreed with the plurality that for purposes of promotion money laundering, where the underlying unlawful activity is an illegal gambling business, the rule of lenity applies and "proceeds" meant "profits." *Id.* at 2033–34 (Stevens, J., concurring in the judgment). Justice Stevens concluded, however, that the Court need not adopt a single definition of "proceeds" to apply to every illegal activity that produces unclean money. *Id.* at 2032, 2034 n.7 (Stevens, J., concurring in the judgment). Thus, Justice Stevens, agreeing with the principal dissent, observed that "the legislative history of § 1956 makes it clear that Congress intended the term 'proceeds' to include gross revenues from the sale of contraband and the operation of organized crime syndicates involving such sales." *Id.* at 2032 (Stevens, J., concurring in the judgment).

The principal dissent, written by Justice Alito, observed that "the term 'proceeds' cannot vary from one money laundering case to the next, and the plurality and Justice Stevens inappropriately allow the interpretation of that term to be controlled by a problem that may arise in only a subset of cases." *Id.* at 2045 (Alito, J., dissenting). Alito characterized the plurality's view as implausible and found the variability of the approach proposed by Justice Stevens impractical. *Id.* at 2038–39 (Alito, J., dissenting). Accordingly, the principal dissent concluded that "proceeds" should be defined as "gross receipts." *Id.* at 2044 (Alito, J., dissenting).

The Court in *Santos* was split not only concerning the substantive legal questions before it, but also concerning the *stare decisis* effect of its decision. The plurality offered "a word concerning the *stare decisis* effect of Justice Stevens' opinion," stating that "the narrowness of

his ground consists of finding that 'proceeds' means 'profits' when there is no legislative history to the contrary." *Id.* at 2031 (internal citations omitted). Justice Stevens characterized the plurality's statements about the narrowness of his opinion as "the 'purest of dicta,'" and rejected the plurality's "speculat[ion] about the *stare decisis* effect of our judgment . . . ." *Id.* at 2034 n.7 (Stevens, J., concurring in the judgment). He pointed out that his conclusion rested on his "conviction that Congress could not have intended the perverse result that the dissent's rule would produce if its definition of 'proceeds' were applied to the operation of an unlicensed gambling business." *Id.* (Stevens, J., concurring in the judgment). However he added that "[i]n other applications of the statute not involving such a perverse result, I would presume that the legislative history summarized by Justice Alito reflects the intent of enacting Congress." *Id.* (Stevens, J., concurring in the judgment). The principal dissent also opined on the matter: "[i]n light of the plurality opinion's discussion of the '*stare decisis* effect of Justice Stevens' opinion,' it must be noted that five Justices agree with the position taken by Justice Stevens" that the term "proceeds" mean "gross revenue" and not "profits" in the context of drug sales. *Id.* at 2035–36 & n.1 (Alito, J., dissenting). Justice Alito explained that although he did not agree with Justice Stevens's conclusion that the meaning of the term "proceeds" can vary depending upon the underlying illegal activity, "at least that approach preserves the correct interpretation of the statute in most cases that were the focus of congressional concern when the money laundering statute was enacted." *Id.* at 2036 (Alito, J., dissenting).

Given the disagreement in the various opinions, it is clear that the Court was fragmented. It is the policy of the Supreme Court that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court

may be viewed as that position taken by those Members who concurred in the judgments on the narrowest ground.'" *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)). The Third Circuit has recognized that "[i]n splintered Supreme Court decisions where there has been a common denominator standard that would necessarily produce results with which a majority of the Justices from the controlling case would agree, the Supreme Court and the lower courts have consistently identified as binding precedent the opinion setting forth that standard." *Planned Parenthood of Se. Pa. v. Casey*, 947 F.2d 682, 694 (3d Cir. 1991), *modified on other grounds*, 505 U.S. 833 (1992). However, the Third Circuit has also recognized that "[i]n rare cases, no common denominator exists beyond agreement on the result in that particular case." *Id.* at 694 n.8 (citing *United States v. Eckford*, 910 F.2d 216 (5th Cir. 1990); *Schindler v. Clerk of Circuit Court*, 715 F.2d 341 (7th Cir. 1983)). In such cases, where it is "not possible to discover a single standard that legitimately constitutes the narrowest ground for a decision on that issue, there is then no law of the land because no one standard commands the support of a majority of the Supreme Court." *United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003) (citing *Rappa v. New Castle County*, 18 F.3d 1043, 1058 (3rd Cir. 1994)).

Santos may well be a case in which no common denominator exists beyond agreement on the result.[3] Indeed, finding the narrowest ground for the judgment in *Santos* has perplexed many

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[3] *See, e.g.*, *Bull v. United States*, No. 08–4191, 2008 U.S. Dist. LEXIS 100764, at *24 (C.D. Cal. Dec. 3, 2008) (determining that the *Santos* opinions share no common ground and applying the Ninth Circuit's pre-*Santos* definition of "proceeds" to the petitioner's collateral attack on his convictions for distribution of a controlled substance and money laundering); *United States v. Orosco*, 575 F. Supp. 2d 1214, 1218 (D. Colo. 2008) (finding "*Marks* inapplicable [to *Santos*] because Justice Steven's [sic] concurrence is not a 'logical subset' of the plurality opinion"). *But see Garland v. Roy*, No. 09-40735, 2010 U.S. App. LEXIS 16776, at *9

lower courts.[4] The confusion engendered by the decision has led to at least three approaches to determining the *stare decisis* effect of the opinion: one narrow, one somewhat broader, and one clearly stating that Justice Stevens's concurrence is controlling. Courts adopting the narrow reading of *Santos* have determined that the case constitutes binding precedent only in the context of promotion money laundering arising from the operation of illegal lotteries.[5] The Ninth and Sixth Circuit Courts of Appeals have adopted the slightly broader view that *Santos* is applicable

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n.4, *27-32 (5th Cir. Aug. 13, 2010) (determining that Justice Stevens's concurrence provides a clear common ground and holding that the concurrence is controlling).

[4] *See, e.g.*, *United States v. Garcia-Pastrana*, 584 F.3d 351, 380 (1st Cir. 2009) (observing that "there is some question as to the holding of *Santos*, since Justice Stevens, the fifth and deciding vote, suggested in concurrence that the holding may vary by offense and the legislative history"); *United States v. Brown*, 553 F.3d 768, 785 (5th Cir. 2008) ("[N]ot even after *Santos* is the law 'clear' on what the prosecution should be required to prove as 'proceeds' in this case; or, if profits must be proved, how this must be done under these circumstances."); *United States v. Ramos*, No. 08–327, 2009 U.S. Dist. LEXIS 69834, at *30 (S.D. Tex. Aug. 7, 2009) ("The precedential implications of *Santos* are unclear, given the plurality and Justice Stevens' rationale for joining in the judgment. Indeed, the opinions in the case itself disagree over those implications."); *Gamboa v. Norwood*, No. 09–0656, 2009 U.S. Dist. LEXIS 17926, at *10 n.4 (C.D. Cal. Feb. 23, 2009) ("The effect of Justice Stevens's concurrence in *Santos* is a matter of some debate."); *United States v. Okun*, No. 08-132, 2009 U.S. Dist. LEXIS 12421, at *27-29 (E.D. Va. Feb. 18, 2009) (categorizing the various interpretations of *Santos* among the lower federal courts); *United States v. Pope*, No. 08–49, 2008 U.S. Dist. LEXIS 103195, at *4 n.2 (W.D. Pa. Dec. 19, 2008) ("The scope of the *Santos* decision is far from clear."); *United States v. Prince*, No. 04–20223, 2008 U.S. Dist. LEXIS 91265, at *20 (W.D. Tenn. Nov. 7, 2008) ("The lower courts have reached varied conclusions about the holding in *Santos*.").

[5] *See United States v. Demarest*, 570 F.3d 1232, 1242 (11th Cir. 2009) ("The narrow holding in *Santos*, at most, was that the gross receipts of an unlicensed gambling operation were not 'proceeds' under section 1956 . . . ."); *United States v. Howard*, 309 F. App'x 760, 771 (4th Cir. 2009) (non-precedential) ("Because *Santos* does not establish a binding precedent that the term 'proceeds' means 'profits,' except regarding an illegal gambling charge, we are bound by this Court's precedent establishing that 'proceeds' means 'receipts.'"); *United States v. Darui*, 614 F. Supp. 2d 25, 30 (D.D.C. 2009) ("To this Court, it appears that when Justices Scalia's and Stevens' opinions are read together, *Santos* defines 'proceeds' as 'profits' only in the context of an illegal gambling operation.").

to cases where reading "proceeds" as "receipts" would pose a merger problem. *See United States v. Van Alstyne*, 584 F.3d 803, 814 (9th Cir. 2009); *United States v. Kratt*, 579 F.3d 558, 562 (6th Cir. 2009); *cf. Garcia-Pastrana*, 584 F.3d at 380 (finding *Santos* inapplicable and observing that the case did not present a merger problem). In *United States v. Van Alstyne*, the Ninth Circuit held that "the holding that commanded five votes in *Santos* [is] that 'proceeds' means 'profits' where viewing 'proceeds' as 'receipts' would present a 'merger' problem of the kind that troubled the plurality and concurrence in *Santos*." 584 F.3d at 814. And in *United States v. Kratt*, the Sixth Circuit held that under *Santos*, proceeds "means profits only when the § 1956 predicate offense creates a merger problem that leads to a radical increase in the statutory maximum sentence and only when nothing in the legislative history suggests that Congress intended such an increase." 579 F.3d at 562. The Fifth Circuit has taken the most expansive view of *Santos*. In *Garland v. Roy*, the Fifth Circuit found that Justice Stevens's concurrence was binding and held that how the trial court defines the term "'proceeds' in the money-laundering statute must be determined via a bifurcated analysis." 2010 U.S. App. LEXIS 16776, at *23 (citing *Santos*, 128 S. Ct at 2034 n.7. (Stevens, J., concurring the judgment)). The court held that:

> [f]irst, a court must determine whether, when "proceeds" are defined as "gross receipts" rather than "profits," the defendant would face the "merger problem." If so, then, consistent with the plurality's decision, the rule of lenity governs and "proceeds" must be defined as "profits"; and the court need not proceed to the second step of Justice Stevens' analysis.

Id. (internal citations omitted). The Fifth Circuit recognized that its approach was "largely consistent with, although distinguishable from, the holdings of the Sixth and Ninth and, likely, the First Circuit." *Id.* at *30.

The Third Circuit addressed the effect of *Santos* in the case of *United States v. Yusuf*, 536 F.3d 178 (3d Cir. 2008). However, the limited scope of the court's ruling in *Yusuf* provides little guidance. In *Yusuf*, the court did state that "the Supreme Court, in *United States v. Santos*, recently clarified that the term 'proceeds,' as that term is used in the federal money laundering statute, applies to criminal profits, not criminal receipts, derived from a specified unlawful activity." *Id.* at 186. Richardson uses this broad statement to support her position that "proceeds" always means "profits" and that a judgment of acquittal should be entered as to her money laundering conviction because the Government did not establish that Richardson and Coles used profits obtained from the drug conspiracy to purchase the Dillons Lane property. (Doc. No. 953–2 at 25, 27.) The holding in *Yusuf*, however, is not so broad. *Yusuf* does not address or attempt to reconcile the Justices' differing views on the *stare decisis* effect of *Santos*; nor does it acknowledge the differing views among the lower federal courts. More importantly, the "narrow issue" before the court in *Yusuf* was "whether unpaid taxes unlawfully disguised and retained by means of the filing of false tax returns through the U.S. mail are 'proceeds' of mail fraud for purposes of sufficiently stating an offense for money laundering." 536 F.3d at 185. The defendants in *Yusuf* were indicted for, among other things, money laundering and mail fraud for mailing false tax returns. The district court granted the defendants' motion to dismiss the money laundering counts of the indictment on the grounds that the defendants' unpaid taxes could not be considered "proceeds" of mail fraud because the unpaid taxes were "unreported gross receipts that were *lawfully obtained* in the [defendants'] day to day business," and because the unpaid taxes were "merely retained, rather than obtained, money resulting from [the] defendants' noncompliance" with the law. *Id.* at 184. The Third Circuit rejected that reasoning

and held that "in light of the Supreme Court's decision in *Santos*, we recognize that the 'proceeds' from the mail fraud in this case also amount to 'profits' of mail fraud." *Id.* at 190. *Yusuf* is therefore properly read as ruling that "proceeds" means "profits" in the context of money laundering charges arising from the specified unlawful activity of filing of false tax returns through the U.S. mail.

Two months after *Yusuf* was filed, a panel of the Third Circuit issued *United States v. Fleming*, 287 F. App'x 150, 155 (3d Cir.) (non-precedential), *cert. denied*, 129 S. Ct. 477 (2008), *and cert. denied*, 129 S. Ct. 966, *and cert. denied*, No. 09–6710, 2009 U.S. LEXIS 7892 (2009). *Felming*, while not precedential, supports our conclusion that *Yusuf*'s holding, and thus its precedential effect, is not as expansive as Richardson argues. In *Fleming*, the panel observed that, "as Justice Alito points out in his dissent, 'five Justices agree with the position' that 'the term "proceeds" include[s] gross revenues from the sale of contraband and the operation of organized crime syndicates involving such sales.'"[6] *Id.* (quoting *Santos*, 128 S. Ct. at 2035 & n.1) (quotation marks omitted). Based on this observation, the panel concluded that "proceeds" means "gross revenue" where the predicate offense is drug sales. *Id.* at 155. In this regard, *Fleming* is in accord with the decisions of several other courts that have held that the term "proceeds" does not necessarily mean "profits" where the specified unlawful activity involves

[6] Even though five Justices in *Santos* agreed that proceeds includes gross revenues from the sale of contraband and the operation of organized crime syndicates involving such sales, those five Justices did not concur in the judgment, and therefore their statements are not the law of the land. *See Marks*, 430 U.S. at 193 (quoting *Gregg*, 428 U.S. at 169 n.15). Nevertheless, the fact that five Justices reached this conclusion is persuasive. *Cf. Rutledge v. United States*, 517 U.S. 292, 303–04 (1996) (treating as persuasive a point of agreement between the plurality opinion and the dissenting opinion in a 4–1–4 decision that "amount[ed] at best to nothing more than an unexplained affirmance by an equally divided court" (discussing *Jeffers v. United States*, 432 U.S. 137 (1977))).

drug crimes.[7] This emerging consensus on the issue is persuasive and further counsels against a broad reading of *Yusuf*.

We adopt the view of the five Justices in *Santos*, the panel in *Fleming*, and the majority of other courts that have considered the issue that "proceeds" means "gross revenue" in the context of drug sales. In doing so, we need not choose the broad readings of *Santos* over the narrow reading or vice versa because neither standard compels us to view "proceeds" as "profits" in the context of this case. Under the narrow reading of *Santos*, the case's precedential effect is limited to promotion money laundering of the proceeds of an illegal lottery and is therefore not applicable here. Under the broader readings of *Santos* expounded by the Fifth, Sixth, and Ninth Circuits, viewing "proceeds" as "gross receipts" poses a merger problem. The facts before us pose no such problem. Coles and the members of his drug conspiracy sold significant amounts of cocaine, and they made a lot of money doing so. Nothing suggests that the purchase of the

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[7] *See United States v. Spencer*, 592 F.3d 866, 880 (8th Cir. 2010) ("Other circuits hold—and this court agrees—that Santos does not apply in the drug context." (citations omitted)); *Demarest*, 570 F.3d at 1242 (refusing the defendant's request to apply *Santos* to "proceeds of an enterprise engaged in illegal drug trafficking"); *Munoz v. United States*, No. 08-6099, 2010 U.S. Dist. LEXIS 27733, at *20 (D.N.J. Mar. 24, 2010) (holding that because the defendant's conviction was for a drug crime, *Santos* could not provide the basis for granting a 28 U.S.C. § 2255 petition); *United States v. Ramos*, No. 03–387, 2009 U.S. Dist. LEXIS 69834, at *32 (S.D. Tex. Aug. 7, 2009) (declining to apply *Santos* to money laundering charges arising out of illegal drug smuggling); *Gamboa*, 2009 U.S. Dist. LEXIS 17926, at *8–9 ("[A]lthough the Supreme Court held 'proceeds' means the net profits rather than the gross receipts of an illegal gambling business, five justices agreed that 'Congress intended the term "proceeds" to include gross revenues from the sale of contraband and the operation of organized crime syndicates involving such sales.'" (quoting *Santos*, 128 S. Ct. at 2032 & n.3 (Stevens, J., concurring in the judgment))); *Pope*, 2008 U.S. Dist. LEXIS 103195, at *4 n.2 (citing *Fleming* for the proposition that "'gross revenues,' as opposed to 'profits,' may be sufficient to establish a money laundering charge in some circumstances"); *see also Orosco*, 575 F. Supp. 2d at 1218 (rejecting the defendant's "contention that the Government's failure to adequately allege or proffer any indicia of proof that he laundered the profits as opposed to receipts of illegal drug trafficking requires dismissal of count four of the superseded indictment against him").

Dillons Lane home, which was paid for in large part with money derived from the sale of drugs, was an expense of Coles's drug conspiracy or a transaction that normally occurred during the operation or in furtherance of the drug conspiracy. *See Santos*, 128 S. Ct. at 2027 (plurality opinion). The opposite is true: Richardson and Coles's actions served to remove the money from the drug conspiracy. There is no possibility of a merger between the drug conspiracy charge and the money laundering charge.

Richardson's argument that the Government failed to prove that the purchase of the Dillons Lane property was made with "proceeds" from the drug conspiracy is unavailing and cannot form the basis for granting her Rule 29(a) Motion.

(b) Knowledge of Illicit Nature of the Funds

Richardson argues that "[t]he government's case-in-chief included no evidence that would permit a reasonable jury to find beyond a reasonable doubt that Asya Richardson knew the funds used for the purchase of the Dillons Lane house [were] from an illegal drug business, a business with which she was not involved, never observed and never discussed." (Doc. No. 953–2 at 17.) The Government responds that "there was an abundance of evidence that the defendant knew she was dating an individual in 2005 who made prodigious amounts of money through drug dealing." (Doc. No. 1067 at 3.) We are satisfied that the evidence presented at trial permitted a reasonable jury to infer that Richardson knew that the funds used for the purchase of the Dillons Lane house were generated by Coles's drug distribution business.

To sustain a money-laundering conviction, the prosecution must prove that the defendant knew that the funds were the proceeds of an illegal activity. *See* 18 U.S.C. § 1956(a)(1); *see also Rahseparian*, 231 F.3d at 1264. Knowledge of the illegal nature of funds may be established by

direct or circumstantial evidence. *See United States v. Corchado-Peralta*, 318 F.3d 255, 258 (1st Cir. 2003); *see also Santos*, 128 S. Ct. at 2029 (plurality opinion) (observing that knowledge "must almost always" be proved by circumstantial evidence); *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003) ("[W]e have never questioned the sufficiency of circumstantial evidence in support of a criminal conviction, even though proof beyond a reasonable doubt is required."). Moreover, the prosecution need not prove that the defendant was involved with, understood, or even knew about the details of the illegal conduct; rather, evidence proving that the defendant "knew the property involved in the transaction represented proceeds from some form" of illegal conduct is sufficient. *See* 18 U.S.C. § 1956(c)(1).

The jury heard direct evidence that as early as 2003 Richardson knew Coles dealt drugs. In the 2003 PFA affidavit, Richardson identified Coles as a "big time drug hustler." (*See* Gov't Ex. 511Q–1.) A reasonable jury could conclude from this statement that not only did Richardson know that Coles dealt drugs, but that he did so on a large scale and earned a significant amount of money in the process. Richardson concedes that the affidavit is probative of her state of mind in 2003, noting that "if the purchase of 117 Dillons Lane had taken place" the same month as she filed the affidavit, "the affidavit would have provided strong circumstantial proof that could sustain [her] conviction." (Doc. No. 953–2 at 37.) Notwithstanding this concession, she attempts to draw a distinction between her knowledge of Coles's affairs in November of 2003 when she filed the PFA affidavit and her knowledge of Coles's affairs in July of 2005 when the couple purchased the Dillons Lane property. Richardson's argument flies in the face of common sense and human experience. It is certainly not what a rational juror would conclude. Richardson analogizes her situation to the utility of old affidavits in the context of obtaining

search warrants, where the timeliness of the information used to establish probable cause is important. (*Id.* (citing *United States v. Forsythe*, 560 F.2d 1127, 1132 & n.6 (3d Cir. 1977); *United States v. McNeese*, 901 F.2d 585, 596 (7th Cir. 1990)).) She argues that because she filed the affidavit about twenty months before she and Coles purchased the Dillons Lane property, the information is stale, and that because the Government did not provide additional evidence that "refreshed" the evidentiary value of the affidavit, the affidavit has no probative value and the jury could not have reasonably relied on it. (*See id.* at 37–38.)

Richardson does not address her argument's flaws. One obvious flaw is that the concept of staleness relates to a problem peculiar to search warrants: the object to be seized might no longer remain where the warrant says it is. *See United States v. Watson*, 423 U.S. 411, 449 n.14 (1977). Staleness has no bearing, for example, on arrest warrants. *Id.* Richardson articulates no reason why staleness should apply to evidence relevant to her knowledge about how Coles earned his money, and she cites no authority that agrees with her conclusion. Setting aside the legal problems with Richardson's argument, it is not persuasive as a matter of common sense. To suggest that Richardson was willing to publicly declare her belief that Coles was a big time drug hustler in 2003, but that she was unaware of this fact some months later when she and Coles entered into a major cash transaction is ludicrous. Twenty months is not a timeframe in which an average person might suppress the astounding revelation that a serious romantic interest was a big time drug hustler—if such a revelation could be suppressed at all. Nor is it a timeframe in which a big time drug hustler winds down his business and becomes a legitimate businessman capable of undertaking major cash transactions. Review of a Rule 29 motion requires that we view the facts in the light most favorable to the Government. Richardson's argument fails under

this standard.

The Government offered additional circumstantial evidence at trial from which a rational juror could find that Richardson was aware that at least some of the money used in the Dillons Lane transaction came from the proceeds of an illegal activity. On at least one occasion, Richardson transported a significant amount of cash for Coles. (*See, e.g.*, Gov't Exs. 267–2552, 267–1575.) She accepted at least one unidentified delivery from a drug dealer who worked for Coles. (*See* Gov't Ex. 267–13671.) Coles talked freely to her about his subordinate being arrested and the financial loss he took as a result; he also spoke freely about other illegal activity in which he was engaged, like dog fighting. (*See, e.g.*, Gov't Ex. 267–371.) The Government demonstrated that Coles had at least two other girlfriends and that his habit with those girlfriends was to discuss his illegal business openly. (*See, e.g.*, Gov't Ex. 302–3477; Trial Tr. 11, 45–46, Jan. 23, 2008, Vol. I.) While the evidence does not directly implicate Richardson in the same way that Coles's other girlfriends were implicated in his drug dealing activities, the law enforcement agents did find signs of the drug dealing trade when they executed a search warrant on the Dillons Lane property. That home, where Richardson resided with Coles and which she nominally owned, contained false identification cards for Coles, multiple cellular phones used by Coles, glassine baggies, a handgun and ammunition, and what appeared to be an informal ledger of drug accounts. (Trial Tr. 246–50, 266–69, 287–89, Jan. 18, 2008.)

Not one of these pieces of circumstantial evidence is alone sufficient to sustain the conclusion that Richardson knew that Coles was a drug dealer in 2005. Viewed together, however, they form a factual nexus on which a rational jury could base a conclusion that Richardson knew that Coles was a drug dealer. When considered alongside Richardson's 2003

public declaration that Coles was a "big time drug hustler," a jury's conclusion that Richardson was aware that Coles was a drug dealer and that at least some of the money used to purchase the Dillons Lane property came from the proceeds of an illegal activity becomes unassailable under Rule 29's deferential standard.

(c) Knowledge of Concealment

Finally, Richardson argues that "the government failed to prove that [she] knew that the purchase of the Dillons Lane property was designed in whole or in part to conceal and disguise the nature, location, source, ownership, and control of the proceeds of a specified unlawful activity." (Doc. No. 953–2 at 23–24.) Richardson argues that "the evidence demonstrated that [she] and Coles always intended for the Dillons Lane property to be jointly owned, and that [she] never intended to, and did not, lie about her income in order to conceal the source of the funds used to purchase the home." (*Id.* at 22.) The Government responds that based upon the evidence presented at trial, the jury could reasonably conclude "that both Coles and [Richardson] intended to conceal the source of the funds used to finance the purchase of the house because they knew the funds were, at least in part, drug proceeds." (Doc. No. 1067 at 12–13.)

Since the money-laundering statute is intended to punish the intentional concealment of illicit proceeds and not just the spending of illicit proceeds, a conviction must be supported by "proof that the purpose—and not merely the effect—of the [transaction] was to conceal or disguise" the funds. *See Cuellar v. United States*, 128 S. Ct. 1994, 2005 (2008). Section 1956(a)(1)(B)(i) requires that a defendant have knowledge that a transaction is designed, at least in part, to conceal the illicit proceeds. *Omoruyi*, 260 F.3d at 294–95. Knowledge of purpose or design to conceal may be established by direct or circumstantial evidence. *United States v.*

Cruzado-Laureano, 404 F.3d 470, 483 (1st Cir. 2005); *see also Santos*, 128 S. Ct. at 2029 (plurality); *Desert Palace*, 539 U.S. at 100. Whether circumstantial or direct, evidence of knowledge or design to conceal must be substantial. *United States v. Majors*, 196 F.3d 1206, 1213 (11th Cir. 1999) (citation omitted); *see also Esterman*, 324 F.3d at 573 (concluding "that a conviction for money laundering under 28 U.S.C. § 1956(a)(1)(B)(i) is valid only where there is concrete evidence of intent to disguise or conceal transactions").

"[W]hen a defendant has . . . acquired an asset that brings a significant present personal benefit to himself or his family," the substantial evidence requirement "becomes paramount." *Garcia-Emanuel*, 14 F.3d at 1475. Thus, purchasing a house with illicit proceeds is not per se evidence of a design to conceal. *See id.* at 1474. Where a real estate transaction is straightforward and there is a conspicuous connection between the property purchased and the illicit proceeds, the transaction cannot support an inference of a design to conceal. *See United States v. Rockelman*, 49 F.3d 418, 422 (8th Cir. 1995). But a real estate transaction in which the source of the funds or the identity of the owner is obscure can support an inference of a design to conceal. *See United States v. Turner*, 975 F.2d 490, 496–97 (8th Cir. 1992). Similarly, merely placing property in another person's name will not support an inference of intent to conceal. *United States v. Sanders*, 929 F.2d 1466, 1472–73 (10th Cir. 1991). But placing property in another's name can help to substantiate an inference of intent to conceal. *See United States v. Kaufmann*, 985 F.2d 884, 894–95 (7th Cir. 1993).

Concealment money laundering charges arising from the sale of drugs are unique because

> [w]henever a drug dealer uses his profits to acquire any asset—whether a house, a car, a horse, or a television—a jury could reasonably suspect that on some level he is motivated by a desire to convert his cash into a more legitimate form. The

> requirement that the transaction be "designed" to conceal, however, requires more than a trivial motivation to conceal.

Garcia-Emanuel, 14 F.3d at 1474. Several courts of appeals have utilized a non-exhaustive list of evidence, first articulated by the Tenth Circuit in *Garcia-Emanuel*, as a starting point for evaluating a jury's determination that a transaction was designed to conceal. *See United States v. Magluta*, 418 F.3d 1166, 1177 (11th Cir. 2005); *Esterman*, 324 F.3d at 573; *McGahee*, 257 F.3d at 527–28; *United States v. Burns*, 162 F.3d 840, 849 (5th Cir. 1998). The list includes statements by a defendant that are probative of an intent to conceal; unusual secrecy surrounding the transaction; structuring the transaction in a way to avoid attention; depositing illegal profits in the bank account of a legitimate business; highly irregular features of the transaction; using third parties to conceal the real owner; a series of unusual financial moves culminating in the transaction; and expert testimony on practices of criminals. *Garcia-Emanuel*, 14 F.3d at 1475–76.

The Government offered evidence at trial that was sufficient for a rational jury to conclude that the purchase of the Dillons Lane property was designed, at least in part, to conceal drug money. A close look at the transaction reveals that it was needlessly complex, which is indicative of a design to conceal. *See Id.*, *United States v. Edgmon*, 952 F.2d 1206, 1211 (10th Cir. 1991) (determining that the defendant's participation in "involved transactions" indicated a design to conceal). It entailed the funneling of a large amount of cash into four bank accounts, three of which were used to write payment checks. Not only were three banks used, but significant cash deposits were made at different branch locations of those banks on the day of settlement. (Trial Tr. 8, Feb. 8, 2008, Vol. I.) Five cash deposits, totaling $34,310, were made at

four bank branches in the hours before settlement on the property. (*See id.* at 5–7; *see also* Gov't Ex. 250D.) Agent Armstrong, the Government's money-laundering expert, testified that this sort of activity is common in money laundering schemes. (Trial Tr. 9–10, Feb. 8, 2008, Vol. I.) Richardson's name appeared on one of the deposit slips. This is direct evidence of Richardson's conversion of a substantial amount of cash—which she knew to be drug money—into a form that was likely to make the source or nature of the funds used in the transaction unclear by obscuring Coles's involvement in the transaction. Given Richardson's involvement in the purchase of the property, her role in depositing $9200 cash in the hours before settlement was additional circumstantial evidence of her awareness of the other cash deposits that occurred that day but which the Government did not directly connect to her. Viewing this evidence in a light most favorable to the Government, we cannot say that it would be unreasonable for a jury to rely on it to infer that Richardson knew that the transaction was designed in part to conceal the source or the nature of the money.

Moreover, Richardson lied on her mortgage application when she overstated her income by $91,000, and she perpetuated the lie by placing the property in her name when Coles was the de facto owner. (*See* Trial Tr. 70, Feb. 5, 2008, Vol. II; Gov't Ex. 710(A).) The indisputable effect of these acts was the concealment of the source or nature of the money used to purchase the property. However, as the Supreme Court made clear in *United States v. Cuellar*, the Government bore the burden of proving that the purpose, not just the effect, of the transaction was to conceal. *See* 128 S. Ct. at 2005.[8] In *Cuellar*, the defendant concealed money in a secret

[8] Although the Court in *Cuellar* reviewed the defendant's conviction for transportation money laundering under § 1956(a)(2)(B)(i), and not transaction money laundering under § 1956(a)(1)(B)(i), the two provisions contain identical language with regard to the "conceal or

compartment in the trunk of his car in order to transport it to Mexico. *See* 128 S. Ct. at 1998–99. A jury convicted him of § 1956(a)(2)(B)(i) transportation money laundering, but he was ultimately acquitted because the prosecution failed to establish that he was transporting the money to Mexico in order to conceal it. *Id.* at 2005. The Court held that "the evidence did not demonstrate that . . . concealment was the purpose of the transportation because, for instance, there was no evidence that [the defendant] knew about or intended the effect." *Id.*

One of the lessons of *Cuellar* is that entering into a transaction with illicit funds can have more than one purpose. By proscribing transactions "designed in whole or in part" to conceal illicit proceeds, the money-laundering statute explicitly contemplates that a defendant may enter into a laundering transaction to both launder money and achieve a legitimate purpose. *See* 18 U.S.C. § 1956(a)(1)(B). Thus, Coles and Richardson's desire for a marital home does not eliminate the taint from the transaction. The jury could have fairly inferred that Richardson intended her misstatements and her decision to place the property in her name to conceal the source of the drug money. *See* 128 S. Ct. at 2005 n.8 ("[W]here the consequences of an action are commonly known, a trier of fact will often infer that the person taking the action knew what the consequences would be and acted with the purpose of bringing them about."). This inference would be particularly easy to draw if the jury concluded that Richardson was aware of the specifics of Coles's drug dealing, rather than just the fact that he earned money from selling drugs. It is true that Coles had laundered some of the money through Take Down Records prior

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disguise" requirement, and the Court's reasoning applies with equal force to transaction money laundering under § 1956(a)(1)(B)(i). *See, e.g.*, *United States v. Huezo*, 546 F.3d 174, 179 (2d Cir. 2008); *United States v. Brown*, 553 F.3d 768, 786 n.56 (5th Cir. 2008); *United States v. Diaz*, No. 04–1353, 2008 U.S. Dist. LEXIS 74484, at *2 n.1 (S.D.N.Y. Sept. 26, 2008).

to the transaction, and perhaps, if the couple had purchased the property in a transparent fashion, the transaction would not have had to be designed to conceal the source of the money.[9] But Coles and Richardson could not effect the transaction in a transparent manner. Instead, they had to conceal the illicit proceeds laundered through Take Down Records a second time by making Richardson appear to be the source of the funds.

Richardson's involvement in the series of unusual financial moves culminating in the purchase of the property in her name, considered alongside the deceit she employed to effect the purchase, elevates her conduct above mere spending of drug money. She is not, for example, like the defendant in *United States v. Corchado-Peralta*, who was convicted of money laundering for using her drug-dealer husband's money to buy luxury goods and to spend lavish amounts on her personal upkeep. *See* 318 F.3d at 259. In that case, the First Circuit reversed the defendant's conviction because "nothing about the purchases, or their manner, point[ed] toward concealment or disguise beyond the fact that virtually *all expenditures* transform cash into something else," and because "the purchased assets were not readily concealable (*e.g.*, diamonds) nor peculiarly concealed (*e.g.*, buried in the garden) nor acquired in someone else's name nor spirited away to a foreign repository (*e.g.*, a Swiss bank deposit box)." *Id.* Similarly, Richardson's purchase of the

[9] This observation, which Richardson raises in her briefing, highlights her reliance on counterfactual assumptions and speculation to support her argument for acquittal. For instance, it assumes that the transaction would not have been designed to conceal if Coles's name had appeared on the deed. We cannot say this is definitively so. The transaction had various aspects that may have indicated an intent to conceal even if Coles's name appeared on the mortgage or deed, such as the use of Naseem Coles's bank account. The Government did not have to prove the counterfactual case suggested by Richardson, and we do not know whether the Government would have offered additional or different evidence had Coles and Richardson purchased the house in both their names. In addition, not all the drug money used in the transaction was laundered through Take Down Records. Some of the money was effectively being laundered for the first time.

property was not the sort of open and notorious transaction that courts have determined cannot form the basis of a money-laundering conviction. *See, e.g., United States v. Dobbs*, 63 F.3d 391, 397 (5th Cir. 1995) (reversing money laundering conviction where the defendant used illicit funds to pay family expenses in transactions that were "open and notorious"). To the contrary, Richardson's conduct made the purchase of the property more likely to obscure the source or nature of the funds used in the purchase. It does not matter that, in retrospect, Richardson and Coles's conduct seems like a poor attempt at concealing their drug money. As the Eighth Circuit has observed, "'the money laundering statute does not require the jury to find that the defendant did a good job of laundering the proceeds.'" *United States v. Turner*, 975 F.2d 490, 497 (8th Cir. 1992) (quoting *United States v. Sutera*, 933 F.2d 641, 648 (8th Cir. 1991)) (alteration omitted).

3. Conspiracy to Commit Money Laundering

In addition to finding Richardson guilty of money laundering, the jury found Richardson guilty of conspiring with Coles to launder money in violation of 18 U.S.C. § 1956(h), as charged in Count 80 of the Indictment. Richardson challenges the sufficiency of the evidence on her conspiracy conviction on substantially the same grounds that she challenges the evidence on her substantive money-laundering conviction.

Section 1956(h) provides that "[a]ny person who conspires to commit any offense defined in this section . . . shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy." 18 U.S.C. § 1956(h). Because the section sets forth the common law definition of conspiracy, "the Government need not prove an overt act to obtain a conviction." *Whitfield v. United States*, 543 U.S. 209, 214 (2005). Accordingly, the elements of conspiracy under § 1956(h) are: "(1) that an agreement was formed

between two or more persons; and (2) that the defendant knowingly became a member of the conspiracy." *United States v. Greenidge*, 495 F.3d 85, 100 (3d Cir. 2007). As is the case for conspiracy in general, the elements of conspiracy under § 1956(h) can be proven entirely by circumstantial evidence. *See United States v. Brodie*, 403 F.3d 123, 134 (3d Cir. 2005); *see also United States v. Huezo*, 546 F.3d 174, 179 (2d Cir. 2008) (determining that "'[b]oth the existence of a [§ 1956(h)] conspiracy and a given defendant's participation in it with the requisite knowledge and criminal intent may be established through circumstantial evidence").

We have determined that a rational juror could have concluded that Richardson knew that Coles was a drug dealer, that some of the money used to purchase the property was proceeds of a specified unlawful activity, and that Richardson purchased the property at least in part with the purpose of concealing those proceeds. The evidence establishing that Richardson did these things in concert with Coles is beyond question. A rational juror could certainly have concluded that there was an agreement between Richardson and Coles and that Richardson knowingly entered into that agreement.

C. Richardson's Evidence

Our analysis above considers the evidence offered by the Government in its case-in-chief. Richardson offered evidence to rebut the Government's case, primarily in the form of testimony. For example, Richardson testified that her statement in the 2003 PFA affidavit that Coles was a big time drug hustler was made at the behest of her parents and the police and that she had no other basis for her belief. (Trial Tr. 85–86, 89–93, Feb. 19, 2008, Vol. I.) She testified that she believed the statement was true, but that Coles was able to convince her that he was not a drug dealer. (*Id.* at 95.) The jury was not obligated to believe Richardson's self-serving testimony.

See, e.g., *United States v. Howard*, 413 F.3d 861, 864 (8th Cir. 2005); *United States v. Perez-Padilla*, 846 F.2d 1182, 1183 (9th Cir. 1988) (per curiam). On balance, none of Richardson's evidence definitively refutes the Government's evidence on any element of either charge. The evidence offered by Richardson did not render the Government's evidence insufficient on any claim. Accordingly, based on the totality of the evidence at trial, Richardson is not entitled to a judgment of acquittal.

IV. RICHARDSON'S RULE 33 MOTION

A. Legal Standard

Federal Rule of Criminal Procedure 33 provides that "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). "Unlike an insufficiency of the evidence claim, when a district court evaluates a Rule 33 motion it does not view the evidence favorably to the Government, but instead exercises its own judgment in assessing the Government's case." *United States v. Johnson*, 302 F.3d 139, 150 (3d Cir. 2002). The court's analysis is limited to assessing whether a miscarriage of justice has resulted in the conviction of an innocent person. *See id.* A new trial is required on the basis of evidentiary errors only when the "'errors, when combined, so infected the jury's deliberation that they had a substantial influence on the outcome of the trial.'" *United States v. Thornton*, 1 F.3d 149, 156 (3d Cir. 1993) (quoting *United States v. Hill*, 976 F.2d 132, 145 (3d Cir. 1992)). "Such motions are not favored and should be 'granted sparingly and only in exceptional cases.'" *United States v. Silveus*, 542 F.3d 993, 1005 (3d Cir. 2008) (quoting *Government of the Virgin Islands v. Derricks*, 810 F.2d 50, 55 (3d Cir. 1987)).

B. Discussion

Richardson moves for a new trial under Rule 33 on two grounds. First, she argues that we erred by failing to instruct the jury that proceeds means profits under the money-laundering statute, 18 U.S.C. § 1956. (Doc. No. 953–2 at 44–45.) In essence, she recasts her insufficiency of the evidence argument as a clear error argument. Our instruction to the jury that "the term proceeds as used in these instructions means any property or interest in property that someone acquires or retains as a result of criminal activity" (Trial Tr. 23, Feb. 25, 2008, Vol I) was not clear error for the same reasons the Government did not have to prove that Coles and Richardson used "profits" from Coles's drug dealing to purchase the Dillons Lane property: the plurality's holding in *Santos* does not extend to drug crimes. *Cf. United States v. Fernandez*, 559 F.3d 303, 314–15, 317 (5th Cir. 2009) (finding no clear error in district court's instruction to the jury that "'proceeds' includes any property, or any interest in property, that someone acquires or retains as a result of the commission of the underlying specified unlawful activity").

Richardson's second argument is that the verdict was against the weight of the evidence. (Doc. No. 953–2 at 46–49.) Richardson has constructed a narrative in which she played the part of "a naïve young woman who fell in love with, and was duped by, Alton Coles, a deceptive, manipulative individual and drug dealer, who hid his illegal activities from her and used her as part of his legitimate front to the outside world." (*Id.* at 1.) In her telling of the facts, "[t]he government proved that . . . Richardson was Coles'[s] victim not his co-conspirator." (*Id.* at 47.) Coles was "an individual who used the women in his life as tools of his trade." (*Id.*) He had Kristina Latney and Monique Pullins to assist him in his criminal activities, but "[h]e needed a woman to give him respectability." (*Id.*) Richardson, "a wholesome young woman," was that

woman, "'a family girl, with family morals behind her.'" (*Id.* at 48 (quoting Trial Tr. 45, Jan. 24, 2008, Vol. I).)

The jury heard this story and rejected it. (*See, e.g.*, Trial Tr. 4–5, 37–39, Feb. 21, 2008, Vol. I.) We need not guess at all the reasons why the jury rejected Richardson's version of the events that led to her arrest and conviction. However, an apparent and significant problem with her story is the role that money played in her relationship with Coles. The Government presented evidence showing that Richardson liked to spend Coles's money and that she often overspent, sending Coles into fits of rage in which he would belittle her, verbally abuse her, and assault her. Nevertheless she stayed with him. (*See, e.g.*, Gov't Exs. 267–6810 at 1; 267–6819 at 2; 275–6805 at 4–5.) While the evidence confirms that Coles was a crass manipulator, it also serves to deconstruct Richardson's characterization of herself as an unwitting victim who was blinded by love. From this evidence, another potential narrative emerges in which Richardson was willing to overlook Coles's drug dealing because his money afforded her the lifestyle that she desired, replete with a custom home and ample spending money. In reaching its verdict, the jury determined that this narrative, or something like it, was closer to reality than the narrative offered by Richardson. Having presided over the trial and reviewed the record, we see no reason to question the jury's conclusion.

Richardson invokes what she calls the jury's "struggle" to convict her as evidence in support of her argument that Rule 33 relief is appropriate here. (Doc. No. 953–2 at 47.) She cites the jury's two requests for clarification of the elements of the money-laundering statute (Trial Tr. 11–12, Feb. 26, 2008; Trial Tr. 11, Feb. 27, 2008) and the jury's initial inability to reach a verdict on Counts 79 and 80 (Trial Tr. 9, Mar. 3, 2008) to support her conclusion. It is

not uncommon for a jury to seek clarification on a point of law or for a jury to inform the court that it is having difficulty reaching a verdict.[10] While it may be conceivable that a jury's deliberation process and questions to the court could provide a basis for granting a Rule 33 motion, there was nothing exceptional about the jury's deliberation or questions in this case. Indeed, the jury's questions and ability to reach a verdict after initial disagreement both indicate that the jurors were thoughtful and diligent in carrying out their sworn duty and that the deliberative process functioned as it should. The interests of justice do not impel us to vacate the judgment and grant a new trial.

V. CONCLUSION

For the foregoing reasons, Richardson's Motions will be denied.[11]

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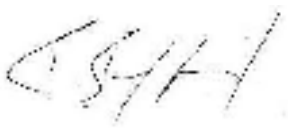
[10] *See, e.g.*, *Campbell v. Polyguard Prods.*, No. 06–2059, 2008 U.S. Dist. LEXIS 76630, at *16 (W.D. Tenn. Sept. 30, 2008) ("Deliberating juries commonly request clarification on the instructions they are given before reaching a final verdict."); *Tighe v. B.C. Sec. Co.*, No. 91–4219, 1994 U.S. Dist. LEXIS 6470, at *16 (D. Kan. Apr. 22, 1994) (observing that "[j]uries often ask for further clarification during their deliberations" and that "[i]f the fact that a jury asked for further clarification were the basis for error, it would be the rare instance that any verdict would withstand challenge").

[11] It is interesting to note that certain events that occurred after the trial shed light on some of the testimony that was presented during the trial. Testimony at trial established that Coles received advanced notice of the raids on August 10, 2005. Coles testified at trial that he had been informed of the law enforcement raids. (Trial Tr. 163–64, Feb. 12, 2008; Trial Tr. 113–15, Feb. 13, 2008, Vol. I.) This led to a rash of telephone calls to two of his other girlfriends, and an attempt to call his chief lieutenant, Timothy Baukman, in the early morning hours before the raids. (Trial Tr. 36, Jan. 24, 2008, Vol. II; Trial Tr. 13–16, 66, Jan. 25, 2008; Trial Tr. 88–89, Feb. 4, 2008, Vol. II.) Although these calls were cryptic, their clear purpose was to hide or destroy evidence in anticipation of the raids. For instance, Coles instructed Monique Pullins to hide an illegal firearm that he kept at her apartment; she complied by dropping it down the building's trash chute. (*See, e.g.*, Gov't Ex. 302–3477.)

After the trial, Richardson's involvement in this sequence of events came to light. *See generally* Trial Tr., *United States v. Durham*, No. 09–405 (E.D. Pa. Sept. 22, 2009). Rickie Durham, a lifelong friend of Richardson's brother, was a detective in the Philadelphia Police Department assigned to the Violent Gang Initiative of the Federal Bureau of Investigation. When

An appropriate Order follows.

BY THE COURT:



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Durham discovered that Richardson was associated with Coles and that their home was going to be subject to a search, he informed Richardson's brother that the police were going to "put [Coles] down" that morning and that if his sister was involved, "she [wa]s going down, too." Test. of Jerome Richardson, *United States v. Durham*, No. 09–405, at 12–13 (E.D. Pa. Sept. 22, 2009). Richardson's brother passed that information on to Richardson, who passed it on to Coles. *Durham* was tried and convicted in this District for obstruction of justice arising from his involvement in leaking the information. *See* Jury Verdict Form, *United States v. Durham*, No. 09–405 (E.D. Pa. Sept. 25, 2009).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

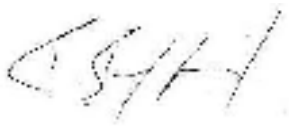
UNITED STATES OF AMERICA	:	
	:	CRIMINAL ACTION
v.	:	
	:	NO. 05–440–18
ASYA RICHARDSON	:	

O R D E R

AND NOW, this 30th day of August, 2010, upon consideration of Defendant Asya Richardson's Motions for Judgments of Acquittal Pursuant to Federal Rule of Criminal Procedure, Rule 29(c), or, in the Alternative, for a New Trial Pursuant to Federal Rule of Criminal Procedure, Rule 33 (Doc. No. 953), and all documents submitted in support thereof and in opposition thereto, and after review of the entire record, it is **ORDERED** that the Motions are **DENIED**.

IT IS SO ORDERED.

BY THE COURT:



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